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No. 97-1267

In The
Supreme Court of the United States
October Term, 1997

PROFESSIONAL PILOTS FEDERATION,
WILLIAM T. REINERS, III, PHILIP T. SHAW,

Petitioners

v

FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the petition for certiorari, petitioners urged that the decision of the D.C. Circuit sustaining the Federal Aviation Administration's extension and reaffirmation of an age-based prohibition on employment for airline pilots should be reviewed by this Court because: (1) The rule is in conflict with a federal statute and a leading decision of this Court interpreting that statute; (2) the D.C. Circuit's approval of the agency's action under an "arbitrary and capricious" standard of review was improper in light of the rule's infringement of congressional civil rights policies; (3) the decision created a conflict with the

reasoning and outcome of decisions in the Sixth, Seventh, and Ninth Circuits. The theme underlying these issues is not unique to the FAA or to aviation. Under the reasoning of the decision below any federal agency may contravene the policy of Congress, the courts, and other federal agencies so long as it gives some explanation, however illogical, and justifies its audacity in the name of a "paramount" goal such as safety or public welfare.

The FAA, in response, defines the issue not as one of whether the FAA is obligated to comply with an act of Congress, but of whether the ADEA "limits the Federal Aviation Administration's authority to adopt ... an air transportation safety standard." Opp. at I. The FAA urges that there is no conflict between the ADEA and the Age 60 Rule because the ADEA and the FAA's governing statute are "addressed to different matters." Opp. at 11. It discerns no tension between the D.C. Circuit's deferential standard of review and the APA requirement for judicial scrutiny of agency actions that are in excess of statutory jurisdiction. Opp. at 15. It finds no conflict between the decision here and the decisions in the Sixth, Seventh, and Ninth Circuits that expressed divergent views on the application, soundness, and legitimacy of the Age 60 Rule. Opp. at 16.

These conclusions follow from the FAA's assumption that its authority to regulate air safety may be exercised without regard for the effect on the civil rights of pilots or the policy of the EEOC. We reply to the FAA's contentions here.

I.
THE CONFLICT WITH THE ADEA, EEOC REGULATIONS, AND THE *CRISWELL* CASE IS MANIFEST.

The ADEA prohibits employers from discharging an employee "because of such individual's age," 29 U.S.C. §623(a)(1), while the Age 60 Rule forbids a Part 121 airline employer to "use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday." 14 C.F.R. §121.383(c). Since the statute prohibits age-based discharge and the regulation requires it, petitioners view the FAA's regulation to be in conflict with the ADEA. What is arbitrary about the rule is that it is not a licensing requirement to operate an aircraft or to carry passengers. Nor does it prescribe safety related qualities or skills as a condition of operating an aircraft. The prohibition, unique to commercial aviation, is linked solely to age and employment. The assertion that the Age 60 Rule does not conflict with the congressional prohibition on age discrimination is sophistry.

It is significant that the Equal Employment Opportunity Commission disputes the FAA's view that the court of appeals' decision "does not conflict with the EEOC's BFOQ regulation." Opp. at 11. In a letter to the FAA in the Age 60 Rule docket proceedings the EEOC chairman urged the FAA "to lift the age 60 limit for commercial pilots" because "The EEOC does not believe that a chronological age limitation for commercial pilots is a BFOQ." R. 379. The EEOC's interpretation of the statute it administers should have been given deference by the court below. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). But the court of appeals here made no reference to the EEOC's

stated position or its regulations in the court's determination that the Age 60 Rule did not infringe on the ADEA. *See* Pet. App. at a-6 - a-9.

The FAA argues that "When Congress intends that civil rights legislation apply to federal agencies in their programmatic activities, it so provides in unmistakable language." Opp. at 10. The Age 60 Rule, unlike the grants programs subject to the FAA's example, 29 U.S.C. §794(a), is a regulatory, not a programmatic activity. Moreover, the ADEA itself reflects Congress's policy of exempting governmental rules from the scope of civil rights legislation when that is its intent. The ADEA contains an explicit exception for employers in foreign countries whose hiring practices would cause the employer "to violate the laws of the country in which the workplace is located." 29 U.S.C. §623(f)(1). The absence of a comparable exception for federal agency regulations, indicates that Congress did not intend to create one.

On similar premises, the FAA seeks to explain the court of appeals' total disregard of this Court's decision in *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). The FAA acknowledges that *Criswell* "endorsed the EEOC's regulation, ruling that an employer has the burden of proving that an age limit is a BFOQ," Opp. at 12, but then asserts that *Criswell* is not applicable because "the court of appeals here did not address whether the Age 60 Rule is a BFOQ." Opp. at 13.

The FAA's conclusion begs the question. Although *Criswell* did not involve a direct challenge to the Age 60 Rule, the Court nowhere intimated that the requirement that an employer prove that age is a BFOQ was subject to an exception for safety regulations by federal agencies. On the contrary, the Court noted that the two part inquiry encompassed in the EEOC regulations "'adjusts to the safety factor' by ensuring that the

employer's restrictive job qualifications are 'reasonably necessary' to further the overriding interest in public safety." 472 U.S. at 413 (quoting *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236 (1976). Moreover, it noted that the probative value of the Age 60 Rule as a BFOQ for flight engineers not only depended on the similarities between the positions but also on "the weight of evidence supporting its safety rationale." 472 U.S. at 418. Thus, the decision implied that the safety rationale of the Age 60 Rule itself is subject to scrutiny under the BFOQ standard.

Contrary to the FAA's assertion, Opp. at 14, the Sixth Circuit's decision in *Coupé v. Federal Express Corp.*, 121 F.3d 1022 (6th Cir. 1997), *cert. denied*, No. 97-1012 (March 23, 1998), also is patently in conflict with *Criswell*. *Criswell* held that BFOQ determinations were factual issues to be submitted to a jury. 472 U.S. at 422. *Coupé* held that the Age 60 Rule constituted a BFOQ as a matter of law, affirming the trial court's grant of a 12(b)(6) motion without affording the plaintiff an opportunity to challenge the scientific basis for the Rule or to show why cargo pilots, who do not carry any passengers, should not be subject to it. 121 F.3d at 1024. Moreover, the court in *Coupé* expressly declined to rule on the "correctness" of the Age 60 Rule, deferring on that issue to the decision of the D.C. Circuit here on appeal . *Id.* at 1026 & n. 2. Therefore, the Sixth Circuit's decision in *Coupé* only compounds the injustice of the decision of the court below and renders the need for review by this Court even more compelling.

II
THE COURT OF APPEALS WAS OBLIGATED TO APPLY AN EXACTING STANDARD OF REVIEW TO THE FAA'S ANALYSIS OF THE ADEA.

Notwithstanding the EEOC's objection that the Age 60 Rule violated the ADEA, the court below reviewed the FAA's decision under an "arbitrary and capricious" standard. 5 U.S.C. §706(2)(A), Pet. App. at a-9, a-10. In the Petition for Certiorari we showed that the FAA was required to consider and to accommodate the EEOC policies in its determinations, consistent with the APA's requirement that agency powers not be exercised "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. §706(2)(C). Pet. at 19 - 22. The FAA responds that petitioners' authorities are "inapposite," because "the Age 60 Rule does not conflict with the ADEA or with the EEOC's regulations and jurisdiction." Opp. at 14.

The FAA's argument can only stand if we assume, as the court of appeals did, that the FAA has no obligation to try to avoid a conflict with the countervailing policy of its sister agency. If, as the EEOC maintains and as the dissent urged, the FAA was obligated to give consideration to age discrimination policy, it is clear that the FAA made no attempt to derive the "precisely and narrowly drawn" remedy required under *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 173-74 (1962).[1]

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[1] The FAA contends that the fault of the agency decision in *Burlington Truck Lines* was that the agency made "no findings and no analysis." Opp. at 15, quoting 371 U.S. at 167. The remark is taken out of context. The ICC Commissioner made extensive findings in *Burlington*. *Id* at 161-63. Where the agency departed from the APA was in its failure to make specific findings that addressed the conflict between its jurisdiction and that of the National Labor Relations Board and to be "particularly careful in its choice of remedy...because of the possible effects of its decision on the functioning of the national labor

The FAA's failure to attempt to accommodate the EEOC and to seek a "narrowly drawn" remedy is evident in the agency's persistent disregard of the conclusions of its own experts. The NIH recommended retaining the Age 60 Rule only long enough for the FAA "to collect the medical and performance data necessary to consider relaxing the age 60 rule." Pet. App. at 44. Moreover, the director of the National Institute on Aging, which prepared the NIH report, later declared under oath that the NIH had "formally abandoned" its endorsement of the Age 60 Rule and "that it was the official position of the NIA that testing of pilots after age 60 was feasible and desirable." R. 636; *See* Pet. App. at a-22, a-29-30, n. 4.[2] The Hilton Report, commissioned by the FAA to study the accident data that was necessary to discharge the agency's statutory mandate to regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents," 49 U.S.C. §44701(c), concluded that the accident rate for older pilots seemed to decline. Pet. App. at a-33, a-57; R. 131. Yet the FAA, in disregard of the recommendations of the NIH and the Hilton Report, refused to grant carefully screened waivers to the Age 60 Rule or otherwise try to obtain the data that

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relations policy." *Id.* at 172. Similarly, detailed findings concerning the conflict between the Age 60 Rule and the ADEA and a careful weighing of the available choices in light of the ADEA policies are absent here.

[2]Although the panel majority below questioned whether the views of the director, Dr. T. Franklin Williams, reflected those of his agency, Pet. App. at a-22, his submissions to Congress are consistent with his expressed views. Dr. Williams submitted a letter to the committee chairman of the House Select Committee on Aging in his capacity as director of the NIA, asserting that further medical research had "documented the predictive value of certain tests," and transmitting an extensive testing protocol developed by Dr. Williams and two of his NIH colleagues. *Age Discrimination and the FAA Age 60 Rule: Hearings before the House Select Comm. on Aging*, 99th Cong., 1st Sess. at 59 (1985).

would permit it to avoid arbitrary age discrimination.[3] *See* Pet. App. at a-34 - a-37 (Wald, J., in dissent discussing the FAA's "refusal to obtain" evidence on older pilot safety).

It is a matter of semantics whether the court below was required to apply a "heightened standard of review," Pet. at 20, or merely required to ensure that the FAA's decision was "in accordance with law," 5 U.S.C. § 706(2)(A) and not "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C §706(2)(C). Under either description the FAA's decision to ignore the expressed objections of the EEOC required a more searching examination than the FAA's disposition afforded. As Justice White noted in *Burlington Truck Lines*, the expertise of federal agencies, if unrestrained, "can become a monster which rules with no practical limits on its discretion." 371 U.S. at 167, quoting *New York v. United States*, 342 U.S. 882, 884 (1951)(Douglas, J. dissenting).

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[3] The FAA cites *Advocates for Highway and Auto Safety v. Federal Highway Admin.*, 28 F.3d 1288 (D.C. Cir. 1994) as requiring that any waiver of a safety standard be factually justified. Significantly, that decision did not prevent the agency there from implementing the rule it proposed. Following remand, the FHWA analyzed studies of accident data, determined that the past record of the drivers was a "reliable predictor of continued safe performance," and implemented the rule. 59 Fed. Reg. 50,887, 50,890 (1994). There is no reason why the NIH's recommendation and the declining accident rate for older pilots identified in the Hilton report should not have provided a similar foundation for an increase in the age limit or for waivers of the Age 60 Rule in the present case.

III
THE CONFLICT IN THE CIRCUITS CONCERNS FUNDAMENTAL ISSUES OF ADMINISTRATIVE LAW THAT MERIT THE ATTENTION OF THIS COURT.

An additional basis that petitioners urged for review by this Court was the conflict in reasoning and outcome between the decision of the court below and that of the Sixth Circuit in *Coupé*, the Seventh Circuit in *Aman v. FAA*, 856 F.2d 946 (7th Cir. 1988) and *Baker v. FAA*, 917 F.2d 318 (7th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991), and the Ninth Circuit in *EEOC v. Boeing Corp*, 843 F.2d 1213 (9th Cir.), *cert. denied*, 488 U.S. 889 (1988). The FAA perceives no conflicts, because the outcome of the *Coupé* case is consistent with that of the court below, Opp. at 17, the *Boeing* case involved flight engineers who were not directly subject to the Age 60 Rule, Opp. at 17, and the *Aman* and *Baker* cases did not invalidate the Rule, notwithstanding the Seventh Circuit's harsh criticism of it, Opp. at 19.

The FAA's view is unreasonably narrow. This Court's consideration of certiorari in cases involving conflicts in the courts of appeals is not restricted to conflicts acknowledged by the lower courts or cases with opposite outcomes. *See, e.g., University of Pennsylvania v. EEOC*, 493 U.S. 182, 188 (1991) (certiorari granted "Because of what might be thought of as a conflict in approach ... and because of the importance of the issue"). The four courts of appeal that have addressed the legitimacy of the Age 60 Rule within the last ten years have come to widely divergent conclusions concerning the Rule's scope and validity. In three of the four courts the soundness of the rule was questioned by the majority or the dissent. *See*, dissent below, Pet. App. at a-38-39; *Baker*, 917 F.2d at 322, 327; *Boeing*, 843 F.2d at 1220.

An important issue is at stake here that directly affects the civil rights of older Americans and indirectly affects everyone who is subject to regulation by a government agency. This Court should intervene to provide needed guidance.

CONCLUSION

As set forth in the Petition for Certiorari, this Court should grant the petition for certiorari to resolve conflicts in the courts of appeals and to define the limits of federal agency discretion.

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